JD–78–05
Wilmington, DE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

J. F. SOBIESKI MECHANICAL CONTRACTORS, INC.
Employer

and Case 4–RC–20964

SHEET METAL WORKERS' INTERNATIONAL UNION, AFL–CIO, LOCAL 19
Petitioner

Andrew Brenner Esq., for the General Counsel.
Steven R. Paisner, Esq. (Paisner Litvin, LLP), of Bala Cynwyd, Pennsylvania, for the Employer.
Bruce E. Endy, Esq. (Spear, Wilderman, Borish, Endy, Spears & Runckel), Philadelphia, Pennsylvania, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDATION ON OBJECTIONS AND CHALLENGED BALLOTS

EARL E. SHAMWELL JR., Administrative Law Judge: This matter was heard by the undersigned on September 8, 2005, in Philadelphia, Pennsylvania. Based on the evidence as a whole, including my observation of the demeanor of witnesses and the posthearing briefs, I make the following findings and conclusions and recommendation.

PROCEDURAL BACKGROUND TO THE LITIGATION

The petition for election in this matter was filed by the Petitioner, Sheet Metal Workers' International Union, AFL–CIO, Local 19 (the Union), on January 7 2005.[1] On February 23, the Regional Director for Region 4 of the National Labor Relations Board (Board) issued his Decision and Direction of Election,[2] inter alia, directing that an election be conducted in the following unit:

> All fulltime and regular part-time Sheet Metal Workers, Fabricators, Installers and Apprentices employed by the Employer [J. F. Sobieski Mechanical Contractors, Inc.],

[1] All dates are in 2005, unless otherwise stated.

[2] See Regional Directors' Decision and Direction of Election (Bd. Exh. 1(b)). The Region was represented at the hearing by Andrew Brenner, Esq., who moved for the admission of the formal pleadings associated with this matter. The formal pleadings encompass Bd. Exh. 1(a)–(h).

excluding all other employees, HVAC Service Technicians, Service Helpers, Clerical Employees, guards, and supervisors as defined in the Act..

The Regional Director's decision also notably ordered the Employer to submit to the Region an election eligibility list[3] containing the full names and addresses of all eligible voters no later than March 2, 2005.

Pursuant to the Regional Director's decision, a representation election was held on March 25. During the election, 2 ballots were cast for the Union, 22 were cast against it, and there were 41 challenged ballots. The Union filed timely objections to the election, and the Employer challenged the ballots of certain named individuals.[4]

Having found that the objections and challenged ballots raised substantial and material issues of fact, the Region determined that a hearing on these subjects was warranted and record testimony be taken at a hearing to resolve the issues at hand. Accordingly, the Region issued its Notice of Hearing on Objections to Election and Challenged Ballots (Notice) on August 5, 2005.

The Notice stated that the following matters required resolution through record testimony:

1. On March 2, 2005, the Employer submitted an Excelsior list containing the names of 73 eligible voters, many of whom later were challenged by the Employer because it claimed that certain individuals were permanently laid off with no reasonable expectation of recall. Accordingly, on March 23, 2005, the Employer submitted a revised Excelsior list containing the names of 28 employees it deemed were eligible to vote and removing the names of certain individuals on the original list.[5] The Union contends that this revised eligibility list improperly deleted the names of over 50 percent of the eligible voters, and, moreover, the Region's service of the revised list gave the appearance of siding with the Employer.

2. The Employer, through one of its supervisors, informed a voting employee that it required him to report to its offices at 1 p.m. on election day to have lunch and attend a meeting.

3. The Employer provided a free lunch for eligible voters on election day.

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[3] See *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); and *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). These cases reflect the Board's view that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, and that all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. (Bd. Exh. 1(b), p. 10.)

[4] The Board agent challenged the ballots of the same individuals on the ground that their names did not appear on a list of eligible voters submitted by the Employer.

[5] It is undisputed that the Employer submitted a revised Excelsior list. By way of background, the Employer retained new counsel during the course of the election campaign. The Employer's new counsel submitted to the Region a letter dated March 23, 2005, explaining that the original list was sent in error by the Company based on the Company's view that the excluded individuals were not on any company recall list and had no reasonable expectation of recall. This theory forms the basis of the Employer's challenge here. (See Jt. Exh. 6.) In this regard, I have also credited the testimony of David Eppelheimer, the Employer's human resource and safety manager, who was responsible for compiling both Excelsior lists for the election and acted on the instructions of both the former and current counsel for the Company.

4. A truck driver employed by the Employer informed eligible voters that a large shipment of urine drug test kits had been delivered to the Employer's facility.

THE SEPTEMBER 8 HEARING; NARROWING OF THE ISSUES

As noted, the hearing on this matter occurred on September 8. The Union at that time announced that it was withdrawing in their entirety its objections to the election, leaving for resolution herein the matter of the challenged ballots of certain individuals. The Union also conceded that certain individuals whose ballots were challenged and on the list of challenged ballots were not eligible to vote in the election and should be removed from the list of challenged ballots.[6] Additionally, the Union, in agreement with the Employer, withdrew its challenge to the ballot of John Facciolo; both parties stipulated and agreed that John Facciolo's ballot should be unsealed and counted. (Tr. 100.)

Accordingly, the hearing proceeded solely to consider whether the challenges to the following 29 individuals' ballots should be sustained as the challenged ballots are determinative of the results of the election.

Steven Bailey
Michael Bellafore
Jason Browne
Bennie Conley
Kevin Coy
Jason DiSantis
Randall Evans
Randolph Farmer
Stephen Finch
Frank Gallagher
Dave Gerhardt
Larry Hettinger
Michael Holloway
Melvin Jones
Richard King
Kurt Magnusson
Michael Francis Merrill
Lawrence Mitchell
Paul Piscarik
Erick Roderick
Carl Sartin
Richard Schnieder
Robert Shearer

[6] The Union stated at the hearing in its brief at p. 2 that the ineligible individuals were as follows:

Chris Oberholtzer
Martinez Fernando (or Fernando Martinez)
Elizabeth Plummer McKenney
Michael Kaminski
Millard Moore
James Wardell
Quincy Dykes
JoeThomchick
Nicholas Kalinevitch
Mark Facciolo
Christopher Cole

Thomas Slaughter
Richard Steward
Quinton Stone
Walter Studzinski
Robert Torres
Jonathan Witz

THE PARTIES' COLLECTIVE-BARGAINING RELATIONSHIP[7]

The Employer's principal place of business is located in Wilmington, Delaware. John Sobieski and Robert Sobieski are respectively president/founder and vice president of the Company that performs both commercial, institutional and residential heating ventilation and air-conditioning work; the Employer also operates two separate divisions for fire protection installation and sheet metal repair.[8] The instant matter involves only the mechanical division, J. F. Sobieski Mechanical Contractors, Inc., which employs laborers, truck drivers, plumbers, heating and ventilation technicians, and more particularly sheet metal mechanics and welders.

On January 30, 2004, the Employer and the Union executed a Section 8(f) collective-bargaining agreement in which the Employer, effective February 12, 2004, agreed to be bound by the Union's master agreement with the Sheet Metal Contractor's Association of Philadelphia and Vicinity, which covered the period July 1, 2001, through June 30, 2004.

The parties' agreement notably, in pertinent part, permitted the Employer to withdraw from the collective-bargaining relation on or before January 31, 2005. The Union, for its part, also agreed that 30 days following the Employer's notice of intention to withdraw, it would disclaim interest in representing the bargaining unit unless the Union obtained Section 9(a) representational status pursuant to or through a representation proceeding before the National Labor Relations Board.

On December 13, 2004, the Employer notified the Union in writing that it would be withdrawing from the aforestated agreement.[9] As noted earlier, the Union filed its representation petition on January 7, 2005.

THE SEPTEMBER 8, 2005 HEARING

The Employer and the Union presented witnesses at the hearing.

John Sobieski (John)[10] testified that he founded Sobieski Mechanical in 1986, operating with one old automobile out of a shed. The Company was not historically a union company. According to John, in 2002, he embarked upon a plan to "grow" his Company, especially in terms of the infrastructure. He invested about $2 million dollars in a new office building and

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[7] In this section, I have relied in part on the findings contained in the Regional Director's Decision and Direction of Election (Bd. Exh. 1(b).) and the credible and essentially undisputed testimony of witnesses appearing on behalf of the Union and the Employer. These findings are largely historical and serve in my mind to add informative background to the substantive issues to be dealt with later herein.

[8] These latter two operations are represented by other labor organizations.

[9] See Jt. Exh. 4.

[10] John Sobieski's younger brother, Robert, also testified at the hearing. I will refer to the elder brother as John to avoid confusion.

fabrication facility. Sobieski also stated that as he expanded his business, he determined that he needed access to a more skilled labor force, one more knowledgeable about current technology and job planning. The idea was to increase his labor related efficiencies, which in part entailed performing a higher volume of jobs using in-house design and fabrication. In this way, John stated that his field work force would operate more efficiently, a special concern because of the highly competitive nature of the industry.

John noted that before this major undertaking, he operated the business with a core of workers, many of whom had been employed for 18 years.[11] However, in order to meet the new goals and standards he was setting for the Company, John determined that he would ultimately have to make substantial investments in his human resources department, including creating an especially good training program. However, in the meantime, he needed a skilled work force immediately. Therefore, John said that he began exploring ways to meet his manpower needs primarily through two union locals operating in his area—Local 74 of the Pipefitters and the Union—both of whom persuaded him that they possessed advanced training facilities and had implemented programs for their members that would meet his need for a well trained and efficient work force.[12]

John said that he spoke with the Union's president and business manager, Joe Sellers, and discussed the collective-bargaining agreement emphasizing his concerns about being competitive in the industry—he would be bidding against other nonunion companies for contracts and he expected an increase in labor costs if he were to sign on with the Union.[13] John also related that his regular workers at the time were fearful and skeptical about signing on with the Union and, in fact, while most of those original workers, about 30–36 core workers, stayed on with the Company, some did quit.

In spite of these concerns, John said that he signed the collective-bargaining agreement in January 2004. However, John noted that the risk of the proposal was very well understood by him, so he negotiated with the Union the back-out clause to be exercised if he did not achieve the anticipated manpower efficiencies of the arrangement.

John related that after the signing, things initially moved along as anticipated—workload picked up and he increased his work force substantially up to about 180 workers by August 2004; all workers hired by the Company were obtained through the Union's hiring hall as agreed.

John stated that after a time, he determined that his manpower efficiencies were not being realized, mainly because he was required to deal with different union locals that operated

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[11] John stated that historically, he operated with a steady work force of employees who worked in crossover fashion either as sheet metal workers or plumbers, depending on the job and volume of business in any given trade. Accordingly, he had very few major layoffs—about 3 in 18 years—over the course of his Company's history. Specifically, John said he never had layoffs from job to job.

[12] John stated that he visited the Pipefitters' facilities in Ann Arbor, Michigan, and met on several occasions with the Sheet Metal officials at their training facilities during the period leading up to his signing the collective-bargaining agreement in January 2004.

[13] Johnson said his chief financial officer had advised him that in order to hire union workers, he would have to increase the volume of his business approximately 30 to 40 percent or as much as 50 percent to create what he described as the "overhead" to cover the expected additional costs associated with signing on with his Union.

under different rules and regulations.[14] Consequently, he found that he was hiring more and more workers and losing money on the projects. John said that during the time he operated under the agreement, the Company lost about $3 million, which nearly bankrupted the Company. Additionally, the Company lost its bond rating and could not bid on new projects. Moreover, contractors who used to engage him discontinued contracting with him because of his affiliation with the Union.

By September 2004, according to John, the Company was in serous financial straits and was forced to borrow additional funds which were depleted within a month. John stated that by October 2004, he determined that he was spending more than he was making and, worse still, his core employees, questioning his judgment, were threatening to quit. It was around this time that he concluded that the arrangement with the Union was not going to work and so decided to exercise the withdrawal option and return to his old way of doing business which included solely working with his core employees.[15]

John said he met with representatives of the Union to inform them of his intentions to vacate the agreement. On December 13, 2004, he wrote to the Union's business manager, Joe Sellers, informing him of the formal termination of the agreement.[16]

John noted that he laid off all or nearly all of the union hires because of a lack of work about 2 months before he formally ended his relationship with the Union. Exceptions were a few union workers who were finishing up on jobs.[17]

John stated that he also met with the Union's Sellers again on January 26, 2005, to discuss some leftover contractual benefits issues. In this meeting, John said that the conversation turned to the financial state of the Company, which at the time was dire. According to John, he also told Sellers that, nonetheless, he still had some work and that he could use some of the union members who may be out of work; moreover, he needed to get jobs in order to fulfill his obligation to pay outstanding pension and other benefits obligations to the Union.

John stated that he knew that some of Sellers' members were out of work and was willing to hire them. John explained that at the time he honestly felt that he was going to go out

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[14] John explained that as a union company, for instance, when he ran out of sheet metal work, he had to lay off the workers; under his old business regimen, he could retain the worker and assign him other duties. This was especially beneficial where he wanted to retain good workers, but also in terms of maintaining a stable work force.

[15] John noted that he also decided at the time to withdraw from a similar collective-bargaining agreement with the Pipefitters Union.

[16] See Jt. Exh. 4, John's termination letter to the Union dated December 13, 2004. It should be noted that there is no dispute between the parties regarding the legality of the Company's withdrawal from the collective-bargaining agreement. According to John, the Union did not object to his proposed withdrawal.

[17] See Employers Exhs. 2 and 3, which purport to show the Company's manpower usage by job man-hours, monthly hours, and total men utilized for calendar 2004. These exhibits show a steady decline in job man-hours and total men utilized from September through December 2004. The Employer's vice president (and brother of John Sobieski), Robert, also credibly testified that in late 2004, the Company had decided to terminate the collective-bargaining agreement, but the layoff of the union members was based on a work slowdown, not the decision to terminate the contract.

of business and told Sellers as much. However, he still owed his Company's share of contributions to the Union's (and other locals as well) benefit funds and was trying to keep the business going by hiring Sellers' out-of-work members and, of course, obtaining work projects.

According to John, Sellers basically rejected his offer, saying that it was all or nothing, you are either a union company or you are not. The meeting ended, according to John, amicably.

John stated that at that time he was willing to employ directly some of the Union members for whom he had a high regard as workers and believed that some may have been offered work by his Company after the termination of the agreement.

The Union called Sellers, who testified at the hearing. Sellers acknowledged that he negotiated and signed the collective-bargaining agreement with the Employer on January 30, 2004, and, as business manager for the Union, was familiar with the procedures and operation of the Union's hiring hall covering the Delaware area that serves the Employer's business.

Sellers also acknowledged that the Employer utilized the hiring hall during the time the collective-bargaining agreement was in effect and, in all likelihood, utilized the "instant rehire" feature of the agreement because this was a fairly standard practice among participating contractors.[18] Sellers stated that a nonunion contractor typically is not permitted to use the hiring hall to supplement his work force.

Sellers admitted that he met with John Sobieski (he thought) some time in February 2005, but certainly after the termination of the agreement, and he told Sobieski that as with all nonunion contractors, the Employer could not utilize the hiring hall to supplement its work force, that this privilege goes with the collective-bargaining agreement.[19]

Sellers noted that after the termination, the Union did send some of its members to apply for work at the Employer's facilities but only as part of its salting program which is designed to organize nonunion contractors; salts are not dispatched from the hall. Sellers also noted that the Employer no longer uses and cannot use the union hiring hall because it is not a signatory to a collective-bargaining agreement and, is, in fact, not obliged to use the hall for a source of workers.

The Union also called union members Bennie Conley, Richard Schnieder, Lawrence Mitchell, Michael James Bellafore, Melvin Jones, and Stephen Finch, with respect to whom

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[18] Sellers explained that instant rehire allows a signatory employer to recall a particular employee up to 30 days after sending him back to the hall. After the passage of 30 days, the employer cannot directly call the worker back to work. Ordinarily, under normal hiring hall procedures, journeyman members are placed on the out-of-work list based on the number of hours worked in the last 12-month period. He noted that employers may reject an employee who does not possess the requisite skills for the job in question. However, Sellers said that he could not recall meeting with Sobieski in January 2005 and discussing whether he could utilize the hiring hall.

[19] I should note that Sellers' testimony here came about with some prodding by the Employer's counsel. Additionally, Sellers did not always answer the questions posed directly and in forthcoming fashion. For example, Sellers initially said that he did not recall telling Sobieski he could not utilize the hall if he was nonunion. He later said a conversation covering this point occurred at a later meeting.

there is no dispute that each man worked for the Employer at various times during the life of the agreement after being called out of the union hall and were employed by the Employer for at least 30 days within the 12 months leading up to the election.[20]

Conley[21] testified about the circumstances surrounding his leaving the Company around October 2004. Conley stated that he spoke to John Sobieski about certain difficulties he was experiencing with the project manager on one of the Employer's jobsites. Basically, this was a personality conflict in Coney's view and, since he knew that layoffs were in the offing, he wanted to be laid off as opposed to quitting so that he could obtain unemployment benefits.[22] According to Conley, John was sympathetic to his issues with the project manager, but asked him to speak to Robert Sobieski who later agreed to lay him off.

Conley stated that he has worked out of the union hiring hall for about 25 years and has been referred to about 10 employers over that time. Conley was asked whether he would have worked for the Employer if he were recalled and responded that given the right circumstances, he would work for anyone. Conley noted that he was familiar with the hiring hall procedure and that normally, if he passed the 30-day mark, he would not expect to be recalled to a contractor.[23] Conley said he voted in the election because he has a lot of loyalty to the Union. He acknowledged that the Union asked anyone who had worked for the Employer to vote in the election the members knew was to take place.

Schnieder testified that he worked for the Employer during 2004 on two separate occasions, having been referred out of the hall by the Union to these jobs. Schnieder believed that the was laid off from the last job in the spring of 2004[24] and was told of his layoff by Conley, his foreman, who said the job was winding down and that others were also being laid off.

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[20] The ballot of each man is subject to the instant challenge. It should be noted that the parties stipulated and agreed to the following proffer of the Union's counsel offered to eliminate needless repetition and redundancy of proof for the remaining challenged ballots:

> The balance of our witnesses would all testify they were all employed by J. F. Sobieski Mechanical Contractors; that there came a time during the course of their employment that they [were] advised they were being laid off work lack of work.

Union counsel also proffered that not all his witnesses were hired out of the hiring hall by the Employer. (Tr. 94.) I presume in these latter cases, the instant hire feature was utilized. Additionally, the Employer does not dispute that the individuals whose ballots are under challenge, including those who testified at the hearing, worked at least 30 days within the 12 months leading up to the election. Notably, the Petitioner's (Union) Exhs. 1 and 3, a work history of all Local 19 members who worked for the Employer from February 1, 2004 to February 24, 2005, and a summary of days worked by the affected balloters, respectively, clearly demonstrate this point.

[21] The parties stipulated and agreed that Conley served as a foreman for the Company although he was a member of the bargaining unit and was a union member hired from the hall. The parties in likewise stipulated that Danny Hunt, who did not testify at the hearing, was also a foreman and member of the bargaining unit; he was one of the Employer's "core" employees, however.

[22] Conley acknowledged that he asked to be laid off by the Company because of the antagonism of the project manager on that particular jobsite.

[23] Conley stated there were special exceptions to this practice but did not elaborate.

[24] Petitioner (Union) Exh. 1 indicates that Schnieder received benefits credit for the time he was employed by the Employer covering February 29 through September 30, 2004. I would note that Schnieder did not seem to possess a good memory for significant dates.

Schnieder said that some time after his layoff, he directly applied for a job at the Employer, having heard that the Company was hiring. He could not recall the date of his application, but he was never called back by Sobieski Mechanical.[25] Schnieder admitted that while he was not sure about the ending of the contract between the Union and the Employer or what may have transpired between them after the election, he did not expect anything (regarding being recalled) from the Company. (Tr. 89.)

Mitchell testified that he is a Local 19 journeyman sheet metal worker and was laid off by the Employer on September 2, 2004, because a phase of a project on which he was working was being postponed. According to Mitchell, Robert Sobieski explained at the time that he would be recalled if the project restarted and workers were needed.[26] Mitchell said he never was recalled by the Employer.

Mitchell noted that when Robert said that he would be recalled, he thought the recall work would be based on the 30-day call-back procedure followed by the hiring hall and assumed that Robert was also thinking along those lines.[27] Mitchell believed at the time that he would be recalled within 2–3 weeks, because he had an idea of how long the next phase of the job would take to complete and the number of workers needed. He felt confident that he would be recalled for the next phase because Robert said he was very pleased with his work.

Mitchell stated that he has never worked for a nonunion employer and has never been referred to one from the hiring hall. However, he stated that he has applied to nonunion shops because the referral system does not work in this fashion.[28]

Bellafore testified that he, too, was a sheet metal worker referred to the Employer by the Union.[29] Bellafore said that he was informed he was laid off by his foreman, Danny Hunt,[30] who passed the word from Robert Sobieski. According to Bellafore, Hunt told him at the time that work was really slow and that he would be called back if the Company had work. Bellafore said he never was called back to work for the Employer.

Jones testified that he was a union apprentice sheet metal worker referred from the hall during the time he was employed by the Employer. Jones could not recall the month of his layoff but that Conley informed him at the time that while work was slow, he might be called back in 1 or 2 weeks.

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[25] Schnieder noted that between the first and second time he was referred to the Employer, he was referred out to other employers from the hiring hall.

[26] Mitchell related that at the time of his conversation with Robert, he had already been laid off and was seeking some additional work as he was refinancing his home.

[27] Mitchell said that he has been referred for work out of the hiring hall since March 1980, and was familiar with its general operation and procedure. He explained the process in his testimony.

[28] Mitchell was not clear in this aspect of his testimony. While Mitchell did not expressly refer to his possible involvement in a salting campaign, I take this to be his meaning in this instance because it seems clear that union members cannot or do not make direct application to work for nonunion contractors under normal circumstances.

[29] Bellafore worked for the period covering October 31 through November 20, 2004.

[30] As noted, the Employer and the Union stipulated that Hunt was a bargaining unit foreman but was a core employee of the Company.

Jones noted that he has worked out of the hiring hall for about 2 years and has never been referred to a nonunion contractor from the hall. He admitted that since the Employer is nonunion, he would not expect to be recalled to work for it.

Finch testified that he was employed by the Employer and during his time with the Company, he acted as shop steward and ran what he called the call line. Finch said that he was laid off on December 10, 2004, and spoke to Robert Sobieski as he was leaving the premises. According to Finch, Robert gave him his last check and said that if he (Finch) "went" nonunion, to give him a call.

Finch stated that Robert did not discuss the nature of (temporary or permanent) or the reason for the layoff, but that he (the Company) was backing out of the contract, which to him (Finch) meant going nonunion. Accordingly, Finch said that at the time of his layoff, he did not expect to be recalled as he had never been referred out of the hiring hall by the Union to work for a nonunion company. Finch said that he was not recalled by the Employer but was sent back to the hall to be referred out.

APPLICABLE LEGAL PRINCIPLES

It is axiomatic with the Board that in the construction industry the formula set forth in *Steiny and Co.*, 308 NLRB 1323 (1992), and *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078, shall be applied to determine voter eligibility for Board elections, unless there is an expressed stipulation by the parties not to use the *Daniel/Steiny* formula. *Signet Testing Laboratories, Inc.*, 330 NLRB 1 (1999).

The Board, however, has held that even in the construction industry, a party seeking to exclude an individual from voting has the burden of establishing that the individual is, in fact, ineligible to vote. *Regency Service Carts, Inc.*, 325 NLRB 617, 627 (1998). Accordingly, in the appropriate case, it is the employer's burden to show that in the case of laid-off employees, they had no reasonable expectation of recall in the foreseeable future. *Zaneco Construction Systems, Inc.*, 339 NLRB 1048, 1049 (2003); *Apex Paper Box Co.*, 302 NLRB 67 (1991). This determination is made as of the date of the election and depends on objective factors including the past experience of the employer, the employer's future plans, the circumstances of the layoff including what the employees were told as to the likelihood of recall. *D. H. Farms Co.*, 26 NLRB 111, 113 (1973).

The *Daniel/Steiny* formula provides that in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. This formula excludes those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Steiny* at 1326.

The issue in the instant case, given the foregoing principles, is whether the challenged ballots in question should be counted pursuant to the *Daniel/Steiny* formula irrespective of the Employer's withdrawal from the 8(f) contractual relationship and subsequent unavailability of the hiring hall to the Employer as a consequence.

CONTENTIONS OF THE PARTIES

The Union contends that it is undisputed that the Employer works in the construction industry and that the eligibility of any unit of employees employed in the construction industry would be governed by the formula encompassed by the *Daniels/Steiny* line of cases.[31] The Union submits that with respect to all construction industry cases, the *Daniels* formula shall be applied. The Union asserts that the Employer here has advanced no reason compelling or sufficient to not apply the *Steiny/Daniel* formula. The Union avers that the employees whose ballots are the subject of the challenge worked the requisite number of days within the 12 months leading up to the election as called for by Daniels, and should have their respective ballots counted.

The Employer essentially contends that the *Daniel/Steiny* formula as articulated by the Union is not applicable under the circumstances associated with this matter. The Employer argues that *Daniel/Steiny* was a formulaic mechanism designed to identify employees laid off in a construction setting who have a reasonable expectation of recall without having to resort to individualized determination of eligibility. The Employer submits that here none of the former employees under challenge can expect to be recalled because as of the election and continuing to the present, it was not and is not able to recall the former employees.[32]

The Employer further submits that the Region recognized that eligible voters should not include workers in effect permanently laid off because their union status would not permit them to work for a nonunion company, such as what happened when the Employer lawfully exercised its withdrawal right under the collective-bargaining agreement.

The Employer argues on bottom that after it withdrew from the 8(f) agreement, it reverted to its pre-agreement core employee work force which overwhelmingly voted to reject the Union in the election. The Employer submits further that to count the votes of employees who do not presently work for it, who have no reasonable expectation of returning to work, and can only be hired by it through a hiring hall no longer available to the Company would adversely and improperly affect the current employees' freedom of choice regarding their collective-bargaining representatives and undermine the effective use of 8(f) agreements. The Employer requests that the challenges be sustained and the results of the election be certified.

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[31] See the Regional Director's Decision and Direction of Election (Bd. Exh. 1(b), fn. 3), where it is stated:

> The Petitioner [Union] and Employer have agreed to utilize the construction industry formula set forth in *Steiny* and *Daniel* to determine voting eligibility."

Steiny and Co., 308 NLRB 1323 (1992); *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967).

[32] The Employer points to the following portion of the Regional Director's Decision dealing with eligible voters to underscore that those permanently laid off were not contemplated to vote, and accepted its Excelsior list.

> The eligible voters shall be unit employees employed during the designated payroll period for eligibility, including employees who did not work during that period because they were ill, on vacation, or were ***temporarily laid off***. [Emphasis supplied by the Employer in its brief, at p. 4.]

The Employer also noted that in the Notice of Election (Ct. Exh. 1), the Region neglected to include the temporarily laid off among the included eligible and included only those falling under the *Daniel/Steiny* formula.

ANALYSIS

The Employer is engaged primarily in commercial, residential, and industrial construction. On January 30, 2004, the Employer and the Union entered into an 8(f) contract whose primary purpose was to supply skilled manpower in adequate numbers to the Employer, which had embarked on a major expansion of its business.[33] Prior to the execution of this agreement, the Employer operated with a nonfluctuating work force comprised of core or long-term employees numbering around 30 or so.

The material terms of the 8(f) agreement included the mandatory use of the Union's hiring hall by the Employer for its work force needs and the ability of either party to withdraw from the agreement, provided written notice was extended to each and the other.

During the course of the agreement, the Employer extensively utilized the hiring hall but retained its core or long term employees for various projects. The arrangement worked reasonably well until the Employer determined that the use of the union labor force was no longer financially or economically feasible and decided to exercise the withdrawal option. There is no dispute that the Employer acted legally in exercising its contractual rights.

After termination, it seems clear that the Union and the Employer met, either in January or February 2005 to discuss the Employer's continued use of the hiring hall to supplement its work force. It is equally clear that the Union emphatically rejected these overtures, stating that without an agreement, its members could not be utilized through the hall. In my view, it was at this time the challenged balloters, who unquestionably had satisfied the *Daniel/Steiny* formula for eligibility, were or could be considered permanently laid off and could not reasonably expected to be recalled by the Employer. I note that each of the challenged balloters seemed to be of this mind. Each man testified to the effect that once the agreement was no longer in place, he did not expect to be called back to the Employer. Some said they had never worked nonunion with the exception of times when the Union asked one or the other to apply at a nonunion employer, presumably for organizing purposes. It is equally clear that irrespective of the existence of an 8(f) agreement, Local 19 members were free to apply for work at the Employer and, according to John Sobieski, some may have.

However, for purposes of the challenged ballots issue, whether the Union's members could apply directly to the Employer is not pertinent in my view. The point here is whether, under the special circumstances here, the *Daniel/Steiny* formula should apply.

In *John Deklewa and Sons*, 282 NLRB 1375, 1386 sub nom. *Iron Workers Local 3 v. NLRB*, enfd. 843 F.2d 770 (3rd Cir. 1988), the Board held that an employer can terminate its collective-bargaining relationship after its 8(f) contract has *expired*. However, this fact did not diminish the short term construction employees' substantial interest in the employer's conditions of employment or change the existing electoral mechanism for expressing representation desires.

In *Wilson and Dean Construction Co., Inc.*, 295 NLRB 484 (1989), the Board was presented with an opportunity to flesh out *Deklewa*. The facts of *Wilson and Dean* are

[33] I have generally credited the testimony of John Sobieski regarding the history of the parties' bargaining relationship and its termination. Sobieski testified forthrightly and with no evident hostility to the Union and its counsel. He spoke calmly, matter-of-factly, and consistently, and his testimony jibed with and was corroborated by other record evidence.

somewhat similar to those of the instant case. In *Wilson and Dean*, the union and the employer had a near 30-year 8(f) collective-bargaining relationship which, upon expiration, the employer informed the Union that the relationship was terminated. Accordingly, the employer no longer used the hiring hall procedure and adopted a new hiring procedure utilizing a roster of employees it had compiled; the roster included the names of all former employees, as well as those who never had previously been employed but had responded to advertisements placed by the Company. The employer there contended that although it intended to remain in the construction industry, the *Daniel* formula was inapplicable because it relied on its compiled list as opposed to the union hiring hall as a source of future employees, and that its former (union employees) had no reasonable expectation of future employment. The Board determined that although the employer's hiring hall criteria gave no preference to former employment status, it did not preclude the hiring of former employees and found that the employees who met the *Daniel* eligibility requirements thereupon had a reasonable expectation of future employment with a substantial continuing interest in the employer's conditions of employment and were eligible to participate in the election. Id. at 485.

The material facts of the instant litigation are inapposite to those of *Wilson and Dean*.[34] Here, the Employer and Union have a very short bargaining relationship that, in my view, was carefully and assiduously negotiated to meet specific goals by both parties, with the mutual understanding that the relationship may not endure; hence, the withdrawal feature.[35] While Sobieski Mechanical clearly intends to remain in the construction industry, it has reverted to its longstanding use of its core workers, who were employed long before the recognition agreement as well as during its existence, and its former hiring, layoff, and recall procedures set out in the Company's employee handbook.[36]

Thus, in my view, the instant case presents a novel issue with respect to its application to the *Daniel/Steiny* formula.

In agreement with the Employer, I would conclude that the challenge to the respective ballots be sustained. In my view, the Employer has met its burden to show that the 29 challenged balloters were ineligible to vote on grounds that they were effectively permanently laid off and had no reasonable expectation of recall by dint of the termination of the parties' 8(f) collective-bargaining agreement, which, inter alia, permitted the Employer to withdraw its recognition of the Union and the Union to preclude access to its members through the hiring hall. As noted by the Employer, under the particular circumstances, ironically, it is precluded from recalling the affected individuals by the very Union seeking their inclusion in the election results. Also, it seems clear to me that without an agreement, the union members themselves, although working in the sheet metal trade, would not work for this Employer. In this sense, the

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[34] It should be noted that the agreement here not only permitted a mutual withdrawal, but the Union also agreed to disclaim interest in the bargaining unit in the event of a withdrawal on or before January 31, 2005.

[35] I recognize that the former union members here, as in *Wilson and Dean*, are not precluded from directly being hired by the Employer, who admitted as much. However, based on Sellers' adamant stand, it seems highly unlikely that his members would apply for work with a nonunion employer. I note Conley's testimony in that regard, who clearly expressed his loyalty to the Union. Other union members testified at the hearing that they had never worked nonunion. It would seem that there is little likelihood that Local 19 members would directly apply for work at the Employer; except for organizational purposes, none of the union members expected to be recalled to a nonunion company.

[36] See Petitioner (Union) Exh. 4.

layoff of the union balloters was permanent as opposed to temporary as envisioned by the Region. Also, it seems clear that the parties understood from the inception that their agreement would not be utilized to give the Union recognition beyond its terms if the withdrawal option were exercised.

I note in passing that the facts and circumstances as determined by me based on the evidence of record form the basis of my decision to sustain the Employer's challenge. However, I am concerned that a larger issue is presented in this matter, one that goes to the Board's expressed interest in promoting peace and good relations between labor and management. In my view, these 8(f) agreements are or can be useful in effectuating Board policies and objectives. Accordingly, I have placed a special emphasis on the parties' agreement and their intentions as best can be gleaned from the record. So while I recognize that the *Daniel/ Steiny* formula has been debated at length and considered overruled and reinstated over the years[37] and the Board has an over-arching concern for the rights of employees in an industry characterized by intermittent employment, I believe a purely mathematical or mechanistic approach to voter eligibility in certain contexts such as the foregoing may undermine the collective-bargaining process, a substantial underpinning of the nation's labor relations policy.

Accordingly, I recommend that the Employer's challenges to the ballots of the individuals previously identified herein be sustained.[38]

CONCLUSION

Based on the foregoing, I recommend that the challenge of ballots of the following individuals be sustained that this matter be remanded to the Regional Director for the issuance of an appropriate certification of the results of the election.

Steven Bailey
Michael Bellafore
Jason Browne[39]
Bennie Conley[39]
Kevin Coy
Jason DiSantis
Randall Evans
Randolph Farmer
Stephen Finch
Frank Gallagher
Dave Gerhardt
Larry Hettinger
Michael Holloway

[37] See, e.g., *S. K. Witty and Co.*, 304 NLRB 1991.

[38] As noted, the parties stipulated and agreed that the challenge to the ballot of John Facciolo be withdrawn and his ballot be unsealed and counted toward the results of the election. I would agree and recommend that the ballot be unsealed and counted toward the results of the election.

[39] The Employer, it should be noted, argued that challenged balloters Jason Browne and Bennie Conley should be disqualified for the additional reasons that Brown was terminated for cause and Conley admitted at the hearing that he asked to be let go, or voluntarily quit. These reasons were not asserted in the original challenge or objections. Accordingly, I leave the resolution of this issue to the Region and/or the Board.

Melvin Jones
Richard King
Kurt Magnusson
Michael Francis Merrill
Lawrence Mitchell
Paul Piscarik
Erick Roderick
Carl Sartin
Richard Schnieder
Robert Shearer
Thomas Slaughter
Richard Steward
Quinton Stone
Walter Studzinski
Robert Torres
Jonathan Witz

Within 14 days from the issuance of this decision, any party may file with the Board in Washington, D.C., an original and seven copies of exceptions thereto. Immediately upon filing such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director of Region 5. If no exceptions are filed, the Board will adopt the recommendations set forth herein.

Dated, Washington, D.C. November 1, 2005

Earl E. Shamwell, Jr.
Administrative Law Judge